Supreme Court, U.S.
FILED

No. 94 440 AUG 24 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK SETOLA,
CHERYL SETOLA,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET INC.,

and

HYDRA-MATIC DIVISION,
GENERAL MOTORS CORPORATION,

and

GENERAL MOTORS CORPORATION,

Respondents.

ON WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court of the United States, as the national guardian and safeguard of Judicial Integrity, require all Federal Judges in passing on cases involving on the exercise of Judicial Discretion, the one area of the Courts where prejudice is most likely to creep in, to state all facts and reasons considered, thus with every case demonstrating that not even the slightest prejudice, favoritism, or bias of any kind,is given any weight, to the end that the "Appearance of Justice and Intrgrity" is maintained, as respect for the Courts and Law is the cornerstone for Democracy?

2. In view of the excessive case loads today for all Courts throughout the United States, which naturally causes some need and incentive for courts to dispose of cases without a trial, is there a need for the Supreme Court of the United States to "crack the whip: on all Judges to direct them not

to grant Summary Judgment where the filings show there is sufficient evidence that at trial a Plaintiff will be able to prove a claim, or a Defendant will be able to prove a defense, and each avoid a directed verdict, although each may have committed some procedural or error, which, if upheld, will unjustly deny that party the claim or defense which by the realistically available evidence, the party deserves? Or at the heart, for such Plaintiff or Defendant to be given leave, after the form or procedural error is pointed out, to attempt to correct such deficiency?

3. In a refiled diversity, personal injury action in Ohio where Plaintiffs, New Jersey residents, are financially unable to come to Ohio, to prepare their responses to voluminous Interrogatories, etc., as planned and desired, due to disabilities caused by Defendants' alleged faults, and the Court, denies Plaintiffs' Motion For An Extension to Answer Requests for Admissions, Interroga-

tories, and then grants a Defendant's Motion to Journalize Admissions, should the Court grant Plaintiffs' Motion Under Rule 36(b) to Withdraw the Admissions, on important points of liability, when Defendants do not, and can not, show any prejudice from the loss of evidence, as required by Rule 36(b), nor any prejudice in preparation for trial, which then was not scheduled, when Plaintiffs have then filed their Responses to the Requests for Admissions, 51 pages of Answers to Interrogatories, and Requests To Production of Documents, voluminous in number, substantially after the journalization of Admissions, but previously by two (2) years or more, all key, and some "work product" documents were given to Defendants, including all evidences on liability and medical records and reports, and Defendants had deposed Plaintiffs in the prior same action, for four (4) days, so that Defendants were not denied any material evidences, nor information, nor documents, and Plaintiffs

and their counsel had cooperated in Discovery, in good faith?

4. In a Product Liability case, involving a defect inthe brake system, by reason of the tested and proven presence in the brake fluid system of a foreign oil, causing the calipers to press against the rotors, generating excessive heat with a progressive resulting loss of braking power, is such a defect a direct contributing cause, or one of the proximate causes, of the resulting collision and serious personal injuries, when the driver, applies the brakes, and they fail completely, as verified leter?

5. Where a Chevrolet car dealer advises the owner of the car purchased from that dealer, that the brake system on the said car, is safe, and that the car is safe to drive, and that all of the car owner's ideas of the defects and dangers in the brake system are merely in the car owner's head, and are not

real, with the result that the car owner relies thereon, and decides thereupon to follow the Dealer's direction and order to drive the car to the Dealer, when the car was in a highly and unreasonably dangerous condition, due to the foreign oil, progressively causing brake loss, is such an act of negligence on the part of the car dealer actionable as to the owner who is injured as a result of such a highly dangerous and irresponsible order by the car dealer, all when the Dealer's Service Manager and mechanic knew or should have known that the brakes could and would progressively lose their power?

6. In such an action where the Court has journalized the Admissions, including one that the Plaintiff admits that his failure to maintain assured clear distance ahead caused the accident covered in Plaintiffs' Complaint, should the Trial Court strictly construe the Admission against the Defendant, and among other things, hold that such admission merely

admits only that Plaintiff's failure was "a proximate cause: and not "the sole cause," and that any negligence or strict liability fault by a Defendant may be an actionable "proximate cause" if the evidence meets the definition of a proximate cause as to such defendant?

7. If Defendants file a motion to strike Plaintiffs' Affidavits, is the court under duty to consider all parts thereof that are not subject to objection as being conclusory, argumentative, hearsay, self-serving, or otherwise objectionable? Or under Rules of Evidence 705, is the Court under a duty, once the deficiency or objectionable parts are, at least, pointed out generally, to give the party an opportunity to correct any errors?

8. In a Summary Judgment action, where numerous Affidavits are filed and the Defendants claim that the Affidavits are defective, is the District Court under Rules of Evidence, 703, 705, under the duty to examine the

Affidavits, looking at them favorably from the standpoint of the party moved against, under Rule 56(c) and (e), and then, if the Affidavits demonstrate by interference the competence of the Affiant to give expert opinions, and then, is the Court under a duty to accept the Affidavits, and is it prejudicial error for the Courts to reject and strike such Affidavits? Under Rules of Evidence 705, is there a duty, if the Court strikes the Affidavits, to give leave to file Dupplementary Affidavits if, and when, any found defects or omissions in the Affidavits are corrected?

TABLE OF CONTENTS

		PAGE
1.	Statement of Questions Presented For Review	i
2.	Table of Contents	viii
3.	Table of Authorities	ix
4.	Statement of the Case	3
5.	Petition For Writ of Certiorari	1
6.	Reference To Official and Unofficial Reports of Opinion	1
7.	Statement of Judicial Grounds	1
8.	Argument For Jurisdiction No. One	24
9.	Argument for Jurisdiction No. Two	33
10.	Argument for Jurisdiction No. Three	43
11.	Argument for Jurisdiction No. Four	45
12.	Conclusion	48
13.	Certificate of Service	x

TABLE OF AUTHORITIES

	PAGE
57 Amer. Jur. 2d Negligence, P. 451	28
Anderson v. Liberty Lobby, Inc., 477 US 422, 91 L.ed 2d 216	26
Conley v. Gibson, 355 US 41, 2 L.ed. 80 (1957)	43
Dickheiser v. Pennsylvania R. Co. 5 F.R.D. 51 D.C. E.Pa. 1945	47
Dillinger v. Caterpillar, Inc., 959 F.2d 430 (3rd Cir. 1992)	30
Farrman & Co. v. M/V Rozita, 903 F.2d 871 (1st Cir. 1990)	39
Gutting v. Falstaff Brewing Corp. 710 F.2d 1309 (CA8, 1983)	34
National Hockey Club, Inc.v. Metropolitan Hockey Club, 427 US 639, 49 L.ed. 2d. 747 (1976)	44
70 O. Jur 3d NEgligence, P. 97	28
Onderko v. Richmond Manufacturing Co. 31 Ohio St.3d 296 (1987)	29
St. Regis Paper Co. v. Upgrade Corp. U.S. D. Ct.,W.D. Mich. S.D. 1980	41

TABLE OF AUTHORITIES CONT'D.

	PAGE
Smith v. First National Bank of Atlanta, 837 F.2d 1575 (11th Cir., 1988)	37
Societe Internationale v. Rogers, 427 US 639, 49 L. ed. 747 (1976)	44
Southern Concrete Co. v. United States Steel, 394 F. Supp. 362 (US DC, N.D. Georgia Atlanta Division, 1975	46
28 USC Section 1332	3
28 USC Section 1254	2
38A Words and Phrases, "Self Servicing Declaration	45A

CERTIFICATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI.

Three copies of the above Petition are mailed by U.S. Mail this August 24, 1994, to Attorneys Marcia Wagner and David J. Rohrbacher, NIcholson and Light, Attorneys for Defendant-Appellee Bob Schmidt Chevrolet, Inc., One SeaGate, Suite 170, Toledo, Ohio 43604-1555, and Attorneys Ray A. Farris and Dennis A. Lyle, Attorneys for Defendant-Appellee Hydra-Matic Division and General Motors Corporation, One SeaGate, Seventeenth Floor, Toledo, Ohio 43603-2088.

John G. Rust

John G. Rust
Petitioners' Attorney

PETITION FOR WRIT OF CERTIORARI

Petitioners Frank Setola and Cheryl Setola do hereby petition the Honorable Supreme Court of the United states to issue in this case a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

REFERENCE TO OFFICIAL AND UN-OFFICIAL REPORTS OF OPINION.

No opinions by either the Court of Appeals, nor the District Court, have been published.

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit judgment herein sought to be reviewed was rendered on May 26, 1994, and on June 16, 1994 rendered the judgment herein sought to be reviewed, denied Plaintiffs "Petition under Rule 40 For Rehearing"

and Plaintiffs-Appellant's Suggestion under App. Rule 35 For Rehearing En Banc because each was filed on June 10, 1994 one day later. See App. P. 3 .

This counsel had mailed about 1:00 A.M., June 9, 1994 the PEtition for Rehearing by Express Mail in time for the mail in the regular truck to Cincinnati to be delivered later that morning, and would have been timely filed, except that this counsel did not know that Express Mail from Toledo to Cincinnati goes to Columbus, and then to Cincinnati; apparently, if the PEtition for Rehearing had been mailed "Priority Mail", the PEtition For Rehearing would have been timely filed.

In 28 USCS Section 1254, the text in part reads:

> "§1254. Courts of appeals; certiorari; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted

upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

In this diversity action, the District Court has jurisdiction under Title 28, U.S.C. §1332,

STATEMENT OF THE CASE

In this Diversity PErsonal Injury Action, Petitioners and Plaintiffs-Appellants, Frank and Cheryl Setola seek to recover for strict liability and negligence for the permanently disabling injuries to Mr. Setola when the brakes on his new 1985 Chevrolet Corvette, less than 60 days after purchase, failed completely to function due to defects in the brakes resulting from a mineral oil getting into the broken system, which in turn caused the brake calipers continually to press against the brake rotors, generating excessive heat, which caused progressively the brakes to get worse, and then this in time caused a complete brake fai-

lure, and this all combined to cause Mr. Setola to run into the rear of a car stopped ahead, on January 30, 1986, in Toledo, Ohio. IF the brakes had worked as they had before, when Mr. Setola drove from some 10 miles away to downtown Toledo, Mr. Setola would have stopped before the collision. When a few minutes before the collision, MR. Setola called the dealer Bob Schmidt Chevtolet, to ask what to do because of multiple brake problems, including having to stop downtown in Toledo with the emergency brake, and the Service Manager and his superior told him the brakes were okay, that the thought of brake problems was all in Mr. Setola's head, and the Service Manager then told or ordered Mr. Setola to drive the Corvette from downtown Toledo, about 10 miles, to Bob Schmidt Chevrolet, Inc., hereinafter referred to as Bob Schmidt. Under Warranty, the owner is supposed to follow directions from the

Chevrolet dealer.

Mr. and MRs. Setola then timely filed on January 29, 1988, an action in the United States District Court, N.D. of Ohio, West Division in Toledo, which was remanded to the State Court, and then dismissed on June 22, 1989, without PRejudice and with the right to refile in one year, under Ohio Rule 41, and Ohio Revised Code 2305.19. The Setolas refiled timely this action in the District Court in Toledo, Northern Division, on June 22, 1990, on Diversity, as the Setolas then were residents of NEw Jersey.

In the prior Action, the Setolas came from NEw Jersey, were deposed by Bob Schmidt and General Motors, hereinafter referred to as "GM," over a total of four days, and informal, but comprehensive Disclosure and Discovery was accomplished voluntarily and some informally, so that all "raw evidences" were given by Plain-

tiffs, including tests of the brake system showing the "mineral oil" contaminant in the Corvette's brake fluid, and complete MEdical documents and even some "work product" papers.

On October 11, 1990 the case was set for trial on September 9, 1991. On November 2, 1990, Bob Schmidt Chevrolet filed volumnious Interrogatories and on June 4, 1991, Plaintiffs completed their work on Bob Schmidt Interrogatories, Request For Production, etc., and filed Supplemental Answers and Responses with 805 pages, copies to G.M.

On June 17, 1991, Plaintiffs moved to vacate their trial date of September 9, 1991, and also to extend Discovery, pointing out the possibility of bankruptcy of Mr. Setola, and the uncertainty arising therefrom; and also some matters eprsonal to this counsel and this was granted July 1, 1991.

General Motors on November 14, 1990, filed voluminous Interrogatories, Requests for Documents and 4 Requests for Admissions. In trying to get these Answers and Responses Mr. and MRs. Setola did not have the money, were either Bankrupt or facing Bankruptcy, or their van broke down, or similar problems prevented them from coming to Toledo as planned. On March 18, 1991, General Motors filed their Motion, to Journalize Admissions, but without first, as we claim, and is true, complying with local District Court Rule 304, which provides:

> "Rule 3.04. PRetrial Discovery Conferences. Counsel are encouraged to participate in pretrial discovery conferences to reduce in every way possible the filing of unnecessary discovery procedures. To curtail undue delay in the administration of justice, no discovery procedure filed under Rules 26 through 37 of the Federal Rules of Civil Procedure to which objection or opposition is made by the responding party shall be taken under consideration by the Court unless the party seeking discovery shall first advise the

Court in writing that, after personal consultation and sincere attempts to resolve differences, the Parties are unable to reach an accord. This statement shall recite those matters which remain in dispute and, in addition, the date, time and place of such conference, and the names of all Parties participating therein. It shall be the responsibility of counsel for the Party seeking discovery to initiate such personal conslutation."

G.M.'s counsel and this counsel had differed, not as to anything, about each other, but when the Corvette's brake system had been inspected at another Chevrolet dealer, one Dave White Chevrolet, Mr. Setola said General Motors had a representative there, but G.M. denied having any papers relating to Mr. Setola's Corvette, although Bob Schmidt had done work under Warranty for Mr. Setola. This counsel had been told before this case, that General Motors would simply, "Stonewall." This counsel did not doubt General Motors' Counsel in Toledo. This counsel did challenge

that General MOtors had a representative at Dave White Chevrolet when the Corvette's brake system was inspected. This was later confirmed by the work notes of the engineer, employed by Mr. Setola's liability carrier, Celina Mutual Company, Mr. Lawrence Wilson, whose Affidavit and work papers were filed on July 1, 1991, and all of whose findings together with the investigations of Mr. Setola's liability carrier, had been given to General Motors' Counsel and to Bob Schmidt's Counsel, in the prior case. But General Motors still denies any papers on MR. Setola.

Although Plaintiffs filed their Motion on April 5, 1991, for an Extension to April 17, 1991, to file Answers to Interrogatories and Responses to Admissions, the District Court denied this time, and on April 10, 1991, entered an Order Journalizing the Admissions, covering the following Requests, which read:

At Page 5 of General Motors' Requests, Interrogatories, etc.:

REQUEST FOR ADMISSION NO. 1: Please admit that there was and is no contract between Plaintiffs and General Motors Corporation in respect of this 1985 Corvette.

At Page 11 of General Motors' Request, etc:

REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G. M.

At Page 12 of General Motors' Request 3, etc.

REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G. M.

At Page 21 of General Motors' Requests, etc.

REQUEST FOR ADMISSION NO. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred to in plaintiffs' complaint.

In response to G. M.'s Motion for Summary Judgment, filed June 12, 1991, which relied exclusively on the Admissions, Plaintiffs filed their Responses, and Affidavits

of Mr. Frank F. Setola, filed July 1, 1991, App. 46; Engineer Lawrence F. Wilson, filed July 1, 1991, Chemist and Engineer Ervin LEshner, filed July 8, 1991, App. 103; and Affidavits of PEter DeWees, filed July 8, 1991, App. 110, and a Supplementary Response, filed July 10, 1991, General Motors' counsel then filed a Reply, and Motion To Strike Plaintiffs' Affidavits of E. LEshner, PEter DeWees, and an unsworn 2-page Interview with a Mechanic, Frank Stevens, on July 31, 1991, discussing brake problems from contaminants. Plaintiffs filed a Response to Motion to Strike Plaintiffs' said Affidavits, on August 29, 1991, and G. M. a Reply on this Motion to Strike Affidavits, filed September 11, 1991.

Plaintiffs defended on the grounds that by Engineer Leshner's Opinion that the contaminated oil was <u>probably in the car when sold by General Motors</u>, and that as a result, the Corvette was unreasonably dan-

gerous and defective and that this defect directly contributed to MR. Setola's collision, and injuries, and General Motors could be held, although this defect might not be the sole cause, but was a proximate cause. Plaintiffs contended then, and now, that to put the contaminated oil into the brake system was neither an act of manu facturer" or "design", and therefore this contention was not barred by the Admissions.

The District Court granted General Motors' Motion for Summary JUdgment, and denied Motions to Strike Affidavits as Moot, on November 4, 1991.

On December 7, 1991, Bob Schmidt Chevrolet filed its Motion for Summary Judgment, depending on MR. Setola's Admission that his failure "to maintain assured clear distance ahead caused the accident averred in Plaintiffs' Complaint"; and also on the Affidavit of Witness

McCray, who was in the car ahead of the car hit by MR. Setola, and swore that she saw Mr. Setola's car in her rear vehicle and could tell that he was coming so fast that he could not stop; and also on the deposition of Police Officer Medon, who did not himself check the brakes, but thought the brakes were o.k. from seeing Mr. Setola move the car. MR. Setola denied the above.

Mr. Pete DeWees' Affidavit, App. 110, 111 stated:

> "Mr. D: About the only thing that I remember is trying to move the car from where the tow truck operator dropped it."

Also Mr. DeWees stated at App. 114:

> "Mr. D: Iremember we were trying to figure out why the brake pedal was so hard and looking at the brake reservoir I remember the fluid in it appeared unusually dark and I think we opened the top of the reservoir, saw the dark fluid, couldn't figure out what it was and I don't know who the party was, but someone called out a chemist or analyst to take a sample of the fluid, and I don't remember who the gentleman was."

And also at App. 121:

> "Mr. R: OK. You said somebody from General Motors was
>
> Mr. D: I thought a factory rep or someone was there at that time or someone from their legal staff, uh, someone was there representing General Motors in one form or another."

And at App. 128:

> "Mr. R: Alright. Was there any other evidences of any defects in the brakes?
>
> Mr. D: Just that the pedal was unusually hard.
>
> Mr. D: And that we could see the discoloration in the fluid."

The District Court granted General Motors' Motion for Summary Judgment, and denied Motions to Strike Affidavits as Moot, on November 4, 1991.

On December 7, 1991, Bob Schmidt Chevrolet filed its Motion for Summary Judgment, Entry 56, and Plaintiffs filed their Response on January 7, 1992, Entry 59, along with the Affidavit of Frank Setola, filed January 7, 1992, Entry 61.

On June 8, Plaintiffs filed their Motion for Leave to File Supplementary Response to Bob Schmidt's Motion for Summary JUdgment and then filed it June 15, 1992 as per Court Order of July 6, 1992.

Also, on June 17, 1992, Plaintiff filed their Motion for Withdrawal of Admissions and tendered their REsponse to Admissions Answers to Interrogatories, and Requests for Production of Documents. On July 7, 1992, General Motors filed their Opposition to Withdrawal of Admissions, although no loss of any evidence was mentioned, and on August 4, 1992, the District Court denied Plaintiff's Motion to Withdraw the Admissions.

Then Plaintiffs timely, on August 12, 1992, filed their Motion for Reconsideration, of Court's Denial of Plaintiffs' Motion to Withdraw Admissions; and on August 13, 1992, filed a Motion to file Instanter Affidavit of Ervin Leshner.

On October 14, 1982, Entry 83, the District Court denied Plaintiffs' Motion for Reconsideration of Order denying Plaintiffs' Motion to Withdraw Affidavits, denied Plaintiffs' Motion for filing additional Affidavits.

On October 16, 1992, the District Court issued Judgment, Terminating the case, App. 14.

On October 30, 1992, Plaintiffs timely served on General Motors and Bob Schmidt Chevrolet's Counsel the Motions to Alter, Amend Judgment under Rule 59 and/or 52 of August 16, 1992, and then on November 2, 1992, filed the said motion, Entry 85, together with an Affidavit of:

Frank setola, App. 7;

Alan Karoly, App. 136;

Douglas Brown,

Cheryl Setola.

This counsel was not able to go to New JErsey, and this necessitated the several

Affidavits. Money causes many problems and lack thereof causes many problems.

On August 17, 1992 the Court granted Plaintiffs' August 14, 1992 Motion for LEave to file the attached Affidavit of Mr. Leshner, sworn to on August 16, 1992, see Entry 75. He opined that General Motors was negligent in using rubber for the seals in the brake system, because since 1980 "new elastomers" were available that do not distort when exposed to oil. In the above Affidavit on Page 1:

"Incompatible Materials in Motor Vehicles A Design Defect

> Research has shown that 15 times for each 1,000 times the brakes or power steering are serviced, the brakes will fail due to power steering fluid in the brake system or the steering will fail due to brake fluid in the power steering system.
>
> In 1937 General Motors introduced automobile hydraulic brakes on the Oldsmobile. At that time, elastomers with the physical properties needed for hydraulic brake systems, were not developed. Rubber was the only material suitable for the seals and hoses used in hydraulic brakes. Rubber swells and deteriorates when it is in contact

oil but is not affected by alcohol. Therefore, alcohol was standardized for brake fluids (glycol and glycerin are alcohols).

Later, power steering systems and transmissions were developed that use oil fluids and elastomeric materials (synthetic rubber) for the seals and hoses. If brake fluid is inadvertently put into the steering reservoir the seals and hoses will deteriorate and fail. When this happens the steering is lost and many accidents follow.

Because brake fluid, power steering fluid, and transmission fluid are frequently mistaken for one another, a safety problem exists. PEople inadvertently refill or add oil to the hydraulic brake reservoir or brake fluid to the power steering reservoir. This causes the brakes or power steering to fail and accounts for many accidents.

The Aircraft Industry and Federal Aviation Administration (FAA) specifies that brake fluid be color coded RED in order to minimize the problem of mechanics using the wrong type of fluid in the brake system. The auto industry color codes transmission fluid RED. This creates confusion with some mechanics.

There is a very high probability that an improper fluid will be used when vehicles are serviced. All manufacturers of motor vehicles are NEGLIGENT in ignoring the safety problem created by the use of incompatible materials in motor vehicles. It is technically and economically feasible to eliminate the hazard that is present in all motor

vehicles through proper material selection.

In recent years (since 1980) new elastomers that do not deteriorate in the presence of oil or alcohol have been developed but the auto industry has not adopted their use for brakes or steering systems.

The use of incompatible materials that create a hazard in a vehicle is a DESIGN ERROR. A product with an unnecessary and correctable safety hazard is DEFECTIVE.

FAILURE TO WARN

All manufacturers of motor vehicles are NEGLIGENT in FAILING TO WARN of the hazard of using improper fluids in vehicle systems.

The designer of a product is responsible for all hazards at the time of design, and should attempt to design them out. The designer must not assume that the user will be aware of any hazardous condition which is obvious to him. The prudent designer should endeavor to see all possible hazards and should use his engineering skills to design out these dangers.

If it is not possible to design out a potential hazard without making the product uneconomic or nonfunctional, it becomes incumbent upon the designer to design permanent warnings in conspicuous locations and of sufficient prominence on the product to cause a person to change their normal behavior. However, warnings are not a substitute for proper design. Dependence on warnings and operating manuals are not in themselves sufficient to assure

product safety."

On October 13, 1992, Plaintiff filed this Motion for Leave to file Instanter Affidavit of Ervin LEshner, Entry 82, sworn to on October 8, 1992, and on Page 1 thereof, Mr. Leshner stated after reciting all the documents and reports heretofore stated herein, as follows:

> "In regard to the issues presented to me for investigation and the statements made to me by Mr. Setola, I have talked with him, read the report No. 209586 Brake Failure Investigation, 1985 Corvette, for Celina Mutual Insurance Co., submitted by Mr. Lawrence F. Wilson, P.E., PResident Product Analysis and Structural Testing, Inc., and assuming the truth of what Mr. Wilson did and observed, as stated in his report, and assuming further the truth of the "analytical report", submitted by MR. K. F. Sporek, dated May 5, 1986, ref.: 209586 by the Contract Laboratories, Inc., Sylvania, Ohio, and so signed by MR. K.F. Sporek; and assuming further that in the brake system fluid, that was withdrawn by MR. Lawrence F. Wilson, had the ingredients or contaminants, as to reported by the said Contract Laboratories, Associates, Inc.; and in assuming the history of the condition and what was done with the said 1985 Chevrolet Corvette,

and assuming the work done by Bob Schmidt Chevrolet, Inc. as shown by their work orders; 56397, 56862, 57828, heretofore mentioned by MR. Setola, it is my professional opinion, that to a reasonable degree of engineering certainty, that, the said brake system fluid was so contaminated that it did cause the brake failure mentioned by MR. Setola, which in turn caused Mr. Setola to be unable to stop said Corvette, and thereby the contaminated brake system fluid, and the prematurely worn brakes that were caused by the swelled brake cylinder rubber parts did proximately cause the said collision of January 30, 1986 and the injuries done therein, and

Based upon MR. Setola's Affidavit and statement that the representatives of Bob Schmidt did direct him to drive this Corvette to the Bob Schmidt Chevrolet and Garage, and that this direction was given to MR. Setola, after he had told them how the Corvette brakes were not functioning properly and offered him difficulty in stopping on the day in question, it is my professional opinion that such directions by Bob Schmidt was highly dangerous.

Based upon Mr. Setola's statements that, if the Corvette's brake system, when he started to drive to the Bob Schmidt Chevrolet Garage had worked as well as the Corvette's brake system had worked when MR. Setola was driving to downtown Toledo earlier that morning, then, it is my opinion within reasonable engineering certainty and probability, that the Corvette's brake system, even defective as it was would have been able to have allowed

Mr. Setola to have stopped before the collision.

Inasmuch as Mr. Setola has stated that when the brake pedal on the Corvette, when on route to Bob Schmidt, was pressed, that he could not get the brake pedal to go down in order to make the brakes function, it is clear and obvious that the brake system was defective, and that this proximately caused the collision that followed.

Obviously, also, if the Corvette's brakes had worked as intended when functioning properly, the Corvette going at even 50 MPH would have been able to stop in the 200 to 300 ft. distance required when the traffic light he was approaching turned from green to yellow.

Mr. Setola approximates his speed to have been 45 MPH (66 ft. per second) when he initially tried to stop. If the distance to stop were only 200 ft., at an average speed of the decelerating vehicle would be 22.5 MPH Mr. Setola would have had 6 seconds to stop. At the time of impact, assuming Mr. Setola was traveling 15 MPH, the average speed would have been 30 MPH or 44 feet per second. Therefore, the total time from the time Mr. Setola saw the traffic light turn yellow until the impact was approximately 4 to 5 seconds.

Mr. Setola had reduced the speed of his vehicle to 10 or 15 MPH at the time of impact by downshifting and attempting to stop the vehicle with the hand brake. MR. Setola states that the hand brake did not function. He also states that the

brakes were dragging prior to the accident. The dragging brakes were caused by the defective master brake cylinder that kept the brake pads in constant contact under pressure with the brake discs, causing the brake pads to wear out prematurely. The hand brake failed to function because the pads wore through completely just prior to the accident. (the hand brake uses the same brake pads as the foot brake but operates only on the rear brakes).

It is my opinion, within reasonable engineering certainty and probability, that the accident would not have occurred if General Motors Corporation had not designed, manufactured and sold a vehicle that was defective because of design errors and failed to warn of the hazard created by the design defect, or if Bob Schmidt Chevrolet properly maintained and repaired Mr. Setola's vehicle, or had not advised him to drive the defective and hazardous vehicle."

ARGUMENT FOR JURISDICTION NO. ONE

AMERICAN COURTS NEED DIRECTION FROM THIS COURT THAT IN AN ACTION WHERE THE TRIAL COURT JOURNALIZES ADMISSIONS THAT THE PLAINTIFF DRIVERS "...FAILURE TO MAINTAIN ASSURED CLEAR DISTANCE AHEAD CAUSED THE ACCIDENT...", IS SUCH AN ADMISSION TO BE CONSTRUED AS THE "SOLE CAUSE", THOUGH SUCH WORDS WERE NOT USED BY THE PARTY DRAFTING THE ADMISSIONS, AND RULED TO PROVIDE A BAR TO ACTIONS FOR NEGLIGENCE, FOR ADVISING THE PLAINTIFF NOT TO DRIVE THE CAR BECAUSE IT WAS IN AN OBVIOUSLY DANGEROUS CONDITION, BECAUSE OF VERY FAULTY BRAKES, AND FAILURE TO REPAIR SERIOUS BRAKE PROBLEMS, AND IN RETURNING THE CAR WHEN THE BRAKES WERE NOT CORRECTED, WITHOUT WARNING THE OWNER, AND FOR STRICT LIABILITY, WHEN THE CAR AS RETURNED HAD OBVIOUSLY DEFECTIVE BRAKES, AS VERIFIED LATER.

First of all, the Courts below construed and applied the word "caused" drafted and chosen by counsel for GM, to mean "sole cause", and each Court showed that it felt absolutely free so to do, and not under any constraint from the U.S. Supreme Court to construe the words against the party choosing such words. Common sense says if GM here meant "caused" to mean "sole cause" or

proximate cause, why didn't they say so.

It is "Hornebook Law" to say that in construing a contract, that the contract will be construed against the party choosing or drafting the words.

Federal Rule 56 (c), Motion and Proceedings thereon, only says in the part here material:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving marty is entitled to a judgment as a matter of law"

The Ohio Rule 56 (c) on this point "spells out" the rule of construction in favor of the party moved against, as follows:

> "A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation

construed most strongly in his favor."

We stated at page 27 of our Brief in the Court of Appeals:

> "In Anderson v. Liberty Lobby, Inc., 477 U.S. 422, the United States Supreme Court states in 91 LEd 2d. at page 216:
>
> 'Credibility determinations, the weighing or the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 US, at 158-159, 26 L Ed 2d 142, 90 S Ct 1598.'"

By Mr. Leshner's Affidavit of July 8, 1991, App. P. 103, he opined from all of Engineer Wilson's findings and the tests of the brake fluid that the oil contaminant was in the Corvette when GM sold it to Bob Schmidt in August, 1985. Since American Customs Parts Manager Pete DeWees found that the brakes were defective, the pedal would not go down, in his

Affidavit, App. P. 114 and 128, the evidence is clear that the oil was in the brake system when it left Bob Schmidt on January 29, 1986, and Prima Facie proof of an actionable defect comes from Mr. Setola's Affidavit, App. P. .

The Trial Court dismissed Plaintiffs claims against GM, and Bob Schmidt, because Mr. Setola's Admission gave each Defendant a complete bar and defense.

Again, prior Federal decisions did not prevent such holding by all the lower courts in this case.

We stated in our Brief in the Court of Appeals at page 26:

> "Mr. Setola swore he would not have driven the car, if he had not been directed so to do by the Bob Schmidt Chevrolet Service Manager.
>
> '...As quoted earlier herein, Mr. Setola, at page 18 of his Affidavit of January 7, 1992, stated in part:
>
> '...and the Bob Schmidt people had told him that it was all in his head, that the car was safe to drive, he then decided to drive, and would not have driven the car except for what

the Bob Schmidt Chevrolet man said.'

"Proximate cause is defined in 70 O. Jur 3d Negligence at page 97:

'Section 37. Definitions
While it has been said that it is not easy to define the term "proximate cause," various judicial definitions of the term are to be found. A frequent definition of the proximate cause of a result is that cause[98] which in a natural and continued sequence contributes to produce the result, and without which it would not have happened.[99] The proximate cause of an injury has also been defined as that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the result would not have occurred.[1]'

And that text at page 96 states: 'There may, however, be more than one proximate cause of an injury.'

57 A Am. Jur. 2d. Negligence states at page 451:

'Section 471. Generally
A proximate cause has been defined as an efficient cause, [94] and generally speaking, it has been said that a cause is proximate when it is not so remote in efficiency as to be dismissed from consideration by the court.[95] The test applied to determine whether negligent conduct was the efficient, or proximate, cause of the injury or loss suffered by the claimant is whether such conduct is a cause without - or "but for" - which [96] the injury would

not have taken place.[97] This is also known as the "sine qua non" rule.[98]"

In Ohio, as this Court may know, the so-called Law of the case is found first in the Syllabus, if the opinion has one. Thus in Onderko v. Richmond Manufacturing Co., 31 Ohio St. 3d 296 (1987), the syllabus reads:

"Volumtary and unreasonable assumption of a known risk posed by a product constitutes an absslute bar to recovery in a products liability action based upon strict liability in tort."

In that holding, the Ohio Supreme Court held that in a strict liability case that Contributory Negligence was not a defense, and Ohio's Comparative Negligence Statute, Ohio Revised Code 2315.19 did not apply in strict liability cases. But on a negligence claim, contributory negligence was a defense, under the Comparative Negligence Statute, if a jury found it to be 51% or more of the fault. On this the Ohio Supreme Court stated in 31 Ohio St. 3d at page 300:

"A plaintiff injured by a product is

not limited to the theory of strict liability as the sole means of redress. An action in legligence may also be available to compensate the plaintiff for his injury. Strict products liability and negligence are distinct theories, but they have never been regarded as mutually exclusive. Section 402A of the Restatement, supra, at Comment a[2]; Lonzrick v. Republic Steel Corp. (1966), 6 Ohio St. 2d 227, 35 O.O. 2d 404, 218 N.E. 2d 185, paragraph one of the syllabus. Nor is a plaintiff required to elect between the two theories. Id. A case in which the plaintiff alleges strict products liability may also be submitted to the fact-finder on a negligence theory. 2 American Law of Products Liability 3d (1987) 44, Section 16:31. Thus, a Plaintiff whose recovery is barred on a strick liability claim due to a finding that he assumed the risk may still recover on a negligence theory where such negligence can be proved. Section 402A of the Restatement, supra, at Comment a. In such a case, the plaintiff's assumption of the risk would not necessarily be an absolute bar but would merely operate to reduce his recovery, if the jury finds that such assumption of the risk amounted to fifty percent or less of the total responsibility for the injuries incurred. R.C. 2315.19; Anderson v. Ceccardi (1983), 6 Ohio St. 3d 110, 6 OBR 170, 451 N.E. 2d 780."

If GM and Bob Schmidt (as seller and repair person) were chargeable with a defect

in the Corvette, then the only question properly was whether the defective brakes was a proximate cause of Mr. Setola's injuries, and his negligence, whatever it was, was not relevant. Thus in Dillinger v. Caterpillar Inc., 959 F2d 430 (3rd Cir. 1992), Plaintiff Dillinger was injured when the brakes of a Caterpillar dumpster failed. On points here material, the Court stated in 959 F.2d at page 443:

> "In our view, Foley does not accurately reflect the approach the Pennsylvania Supreme Court would follow in a strict products liability proceeding. In case after-case, the Pennsylvania Supreme Court has made clear that evidences of a plaintiff's contributory negligence is inadmissible in a strict products liability proceeding. For example, in Berkebile, the court noted that '(t)he crucial differemce between strict liability and negligence is that the existence od due care, whether on the part of the seller or consumer, is irrelevant.' 462 Pa. at 94, 337 A.2d at 899, Next, in McCown, the court specifically held that the plaintiff's contributory negligence was inadmissible to reduce the plaintiff's recovery or th determine the defendant's liability. 463 Pa. at 15-17, 342 A.2d at 382. In Azzarello, the court underscored the notion that the supplier of a product is the 'guarantor' of the product's

safety, and that the jury could find that a product is defective if it 'lacked any element necessary to make it safe for (its intended) use.' 480 Pa. at 560, 391 A.2d at 1027. The court further precueded the mention of the term 'unreasonable' in an instruction concerning the existence of a defect. Pennsylvania's appellate courts, as well as federal courts construing Pennsylvania law, have observed that the Supreme Court has unequivocally excluded negligence concepts from produce liability cases. Conti v. Ford Motor Co., 578 F.Supp. at 1434; Staymates, 364 Pa. Super. at 43-44, 527 A.2d at 143.

Most importantly, there is no meaningful way to reconcile the view that a plaintiff's negligence of the type involved in Foley should be admitted to undercut causation with the Supreme Court's prohibition of the introduction of a plaintiff's negligence to defeat liability. A comparison of the Supreme Court's decision in McCown with the Superior Court's decision in Foley is instructive."

And at page 445:

"For these reasons, evidence of Dillinger's failure to use the alternative braking system or read the operator's manual should not have been admitted to negate causation."

The Third Circuit Court of Appeals in

959 F.2d stated at page 432:

"After a six-day trial, the jury found in favor of Caterpillar, by its negative

answer to a special interrogatory asking whether Dillinger proved by a preponderance of the evidence that the truck 'was defective, that it was defective when it left the defendant's control, and that the defect was a substantial factor in bringing about some injuries to plaintiff.'"

ARGUMENT FOR TAKING JURISDICTION NO. TWO

THE SUPREME COURT IN THE PRESENT ABSENCE OF ANY DEFINITIVE SUPREME COURT RULINGS AND THE SUBSTANTIAL CONFLICTS IN THE DECISIONS OF OTHER FEDERAL COURTS, SHOULD GIVE DIRELY NEEDED DIRECTION TO THE FEDERAL COURTS, AND INDEED, ALL OTHER INTERESTED COURTS, THAT RULE 36(b) SHOULD BE CONSTRUED TO ALLOW THE WITHDRAWAL OF JOURNALIZED ADMISSIONS, WHEN THE PARTY MOVING FOR WITHDRAWAL IS NOT CHARGEABLE WITH WILFUL EVASION NOR BAD FAITH, THOUGH CHARGEABLE WITH DELAY, AND THE PARTY HOLDING THE ADMISSIONS DOES NOT AFFIRMATIVELY SHOW THAT REMOVAL OF THE ADMISSIONS WILL CAUSE THE PARTY LOSING THE ADMISSIONS, NOT TO BE ABLE TO PRESENT MATERIAL EVIDENCE THAT OTHERWISE THE PARTY WOULD HAVE HAD; AND PARTICULARLY ARE THE TRIAL COURTS, UNDER THE IMPLICIT MANDATES OF RULE 1, DIRECTED TO FAVOR WITHDRAWAL OF THE ADMISSIONS WHICH OTHERWISE WILL RESULT REALISTICALLY IN A DEFAULT JUDGMENT, ON LOSS OF THE ENTIRE CLAIM OR ENTIRE DEFENSE.

Firstly, no Court nor party has referred to any controlling ruling by the U.S. Supreme Court. Secondly, there are real, substantial conflicts in the Federal Courts of Appeal DEcisions. Unless needed direction by this Court is given, Rule 36(b) can be <u>deadly</u> to a <u>Plaintiff</u> or a <u>Defendant</u>.

PEtitioner cites, as one leading case Gutting v. Falstaff Brewing Corp., 710 F.2d 1309 (CA 8, 1983), where Mrs. Gutting sued to recover insurance benefits from the death of her husband, and Falstaff defended, claiming her husband, a former Falstaff executive, had been discharged for "proper cause". After her Complaint was filed on July 8, 1981, Falstaff filed on October 13, 1981, Requests for Admissions, Interrogatories and Requests for Documents. Mrs. Gutting's first two counsel withdrew in time for conflicts of interest and her third counsel entered his appearance on March 1, 1982, and her third counsel then on April 9, 1982 filed a Motion under Rule 36 for leave to file her Answers to the requests for Admissions out of time, but this was denied on April 21, 1992. In reversing the District Court, the Eighth Circuit Court of Appeals in parts here material stated, in 710 F.2d at page 1313:

"...Rule 36(b) states in pertinent part: "T[he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Other courts have applied the same test. See, e.g., Herrin v. Blackman, 89 F.R.D. 622, 623-24 (W.D. Tenn. 1981); St. REgis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 357 (W.D. Mich. (1980) (granting defendant's motion to permit late filing of response); see also French v. United States, 416 F.2d 1149, 1152 (9th Cir.1969) (trial court has discretion to permit late response where no prejudice shown). In the instant case, however, the district court did not apply this test when evaluating Gutting's motion to file answers out of time. The court denied Gutting's motion because she never requested an extension of time from the court and the court never granted an extension. Although acknowledging the informal agreement between the parties to extend the time for responding, the court stated that such agreements do not protect the court's own interest in the management of its cases. The district court also based its decision on the "pattern of delay" demonstrated by Gutting and her apparent propensity to "Flout" the time limits of the Federal Rules of Civil Procedure. The district court did not find that Falstaff would be prejudiced by allowing late answers to be filed.

[2] Falstaff argues that prejudice is not important because the

district court denied Gutting's motion to file answers out of time as a sanction for discovery abuse. The district court focused on the delay and almost nonexistent prosecution of this case." (Emphasis Ours.)

Further, in Gutting, Supra, the Court of Appeals held that since Falstaff did not show any loss of evidences, that Falstaff did not show the required "prejudice", and therefore the belated Motion For Leave To Answer the Admissions should have been granted; and on this the Court stated in 710 F.2d at page 1313:

"[3,4] Falstaff further contends that even if a showing of prejudice is necessary, it has satisfied that requirement. Falstaff claims that even though it considered the matters in the request to be admitted, it could not be sure of the court's position and noticed depositions to begin on April 22. The court ruled the matters in the request admitted on April 21 and Falstaff elected to proceed with the depositions because it did not know whether the court might reverse its position. Falstaff claims taking those costly depositions shows it would have been prejudiced if the court had allowed late answers. Falstaff misconstrues the prejudice requirement. Rule 36 (b) states that the party obtaining the admissions must show the withdrawal will "prejudice him in maintaining his action or defense

on the merits." The prejudice contemplated by the rule "relates to the difficulty a party may face in proving its case" because of the sudden need to obtain evidence required to prove the matter that had been admitted. Brook Village North Associates v. General Electric Co., 686 F.2d 66, 70 (1st Cir. 1982); accord Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192, 193 (D.Conn. 1976). Falstaff has made no showing that it will be unable to produce evidence of Ferd Gutting's discharge for cause. It apparently has completed its discovery on this issue. We conclude that Falstaff has failed to show it willbe prejudiced in maintaining a defense on this issue.[5]" (Emphasis Ours.)

In Smith v. First National Bank of Atlanta, 837 F.2d 1575 (11th Cir., 1988) the Defendant Bank first failed timely to file a Response to Plaintiffs Requests for Admissions, and thus became liable to judgment for $50,000.00 Compensatory damages, and $1,500,000.00 punitive damages on Plaintiffs' claims that Defendant Bank was liable for the violations of the Fair Credit Reporting Act, libel, and invasion of privacy for reporting Plaintiff's reported delinquency in her Visa Account,

because her ex-husband had forged her name, when she had no account with the bank. The District Court ordered the withdrawal of the Admissions, and in 837 F.2d at page 1577 emphasized that withdrawal of Admissions should be ordered unless a loss of evidence is proved by the party holding the Admissions, by stating:

> Discovery was reopened for 60 days. Smith was also awarded $18,275 in partial compensation for expenses incurred up until remand. The court provided that plaintiff could seek relief from the withdrawal of admissions if she discovered in

"Discovery was reopened for 60 days. Smith was also awarded $18,275 in partial compensation for expenses incurred up until remand. The court provided that plaintiff could seek relief from the withdrawal of admissions if she discovered in the course of the proceedings "that the delay has in any way affected her ability to obtain appropriate discovery." This was done by a motion to reinstate the admissions. The district court carefully considered, but rejected, every allegation of specific prejudice.

Thus, the district court properly applied the two-part test in Fed.R.Civ.P. 36(b).

In Farr Man & Co., v. M/V Rozita 903 F.2d 871 (1st Cir. 1990) Plaintiff Farr Man was granted summary Judgment on February 19, 1988 on Rozita's failure to Answer Farr Man's Request for Admission, served October 30, 1987. This action involved who was to collect damages to a cargo of sugar, damaged by Amstar, the purchaser, and the stevedoring firm; Farr Man, the seller; and Lloyds of London, the insurers. After Farr Man was Granted Summary Judgment, the Court held a trial between the remaining parties, and then vacated its prior Summary Judgment for Farr Man, and finally re-allocated the amounts of damage going to each. In the Opinion in 903 F.2d the Text emphasized the basic purpose of selling all actions determined on their merits, at page 876 as follows:

> In analyzing whether it was appropriate to permit withdrawal of the admissions, we are guided by

the purposes of the Rule, as explicated by the advisory committee's note:

> Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. Fed. R..Civ.P. 36(b), Advisory Committee's Note."

Also the First Circuit emphasized the Rule 36-(b) intention that withdrawals be allowed, unless the party holding the Admissions would truly suffer a loss of evidence to support that party's claims or defenses, and in 903 F.2d also at page 876 stated:

> "Rule 36(b)'s second part essentially requires that, prior to allowing withdrawal of admissions, the district court be convinced that the party who obtained the admission will not be prejudiced by its withdrawal. As this court has previously stated,
>
> > [t]he prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g.., caused by the unavailability of key witnesses because of the sudden need to obtain evidence with

respect to the questions previously answered by the admissions.

Brook Village N. Assocs. v. General Elect. Co., 686 F.2d at 70. See Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D.Conn. 1976)."

In St. Regis Paper Co. v. Upgrade Corp., (U.S. D.Ct., W.D. Mich. S.D., 1980) withdrawal of Admissions was allowed almost 4 years later, and Defendant allowed to file Answers, because such would serve determination on the merits, and Plaintiff could not show any loss of evidence.

There is confusion in the various Court of Appeals and District Court holdings, and therefore there is need for proper direction from this Court. Mere delay in answering Interrogatories does not result in dismissal; only failure to respond to a Court Order to answer Interrogatories.

We have given far more evidences, information, documents, and photographs, informally and by 4 days of depositions of

Plaintiffs - - all before this present action.

Unless there is strong and clear direction from this court, parties will be subjected to undeserved adverse judgments.

ARGUMENT FOR JURISDICTION NO. THREE

THE UNITED STATES SUPREME COURT AS THE GUARDIAN AND SAFEGUARD OF JUDICIAL INTEGRITY, SHOULD ORDER ALL FEDERAL COURTS EACH TIME IN PASSING ON MATTERS INVOLVING THE EXERCISE OF DISCRETION, TO STATE CLEARLY AND FULLY ALL THE FACTS AND OTHER FACTORS OR REASONS CONSIDERED BY THE COURT, PARTIALLY IN THE INTEREST OF JUDICIAL ECONOMY AND TO ASSIST REVIEWING COURTS WHAT WERE THE DECISIVE AND OTHER FACTS, TO THE END THAT BIAS, PREJUDICE, OR FAVORITISM WILL LESS LIKELY OCCUR, SUCH FACTORS BEING MORE LIKELY TO OCCUR WHEN A JUDGE IS EXERCISING DISCRETION, TO THE END THAT COURTS WILL BE MORE MINDFUL TO MAINTAIN THE APPEARANCE OF JUDICIAL INTEGRITY, AS WELL AS ACHIEVING IT, AND THUS BETTER ATTAIN THE RESPECT OF THE CITIZENS FOR THE COURTS AND LAW, THE CORNERSTONE OF DEMOCRACY.

When a just claim is rejected by the Courts, citizens just don't understand.

As we stated at page 24 of our Reply Brief in the Court of Appeals:

"In Conley v. Gibson, 355 U.S. 41, 2 L.ed 80, (1957), the Court stated the basic principle, in 2 L.ed at page 86:

> 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept

> the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co. 303 US 197, 92 L ed 745, 58 S Ct 507.'"

This counsel does not know of any recent case where lower courts were criticized for taking the Law into one's hands.

On Dismissal, there's been a long time between decisions, since Societe Internationale v. Rogers, 357 US 197, 2 L.ed.2d 1255 (1958) and National Hockey Club, Inc. v. Metropolitan Hockey Club, 427 US 639, 49 L.ed. 2d 747 (1976).

We demonstrated from the start that we had nothing to hide, and, we say, we disclosed more than the Rules require.

But something went wrong here. We ask this Court to direct a return to basic American Values.

ARGUMENT FOR JURISDICTION NO. FOUR

THE UNITED STATES SUPREME COURT SHOULD TAKE JURISDICTION OVER THIS CASE TO MAKE CLEAR TO FEDERAL AND OTHER COURTS JUST WHAT WILL, AND WHAT WILL NOT, BE ACCEPTED IN THE FORM, CONTENT, OF AFFIDAVITS, AND WHETHER AN OPINION IS CONCLUSORY OR NOT, BECAUSE PRESENTLY THERE IS CONFUSION, CONFLICT: AND, ADDITIONALLY, UNDER THE SAME PRINCIPLE OF FEDERAL RULES OF EVIDENCE 705, BEFORE ENTERING AN ORDER OF DISMISSAL, THE TRIAL COURT SHOULD POINT OUT THE FOUND DEFICIENCIES IN THE AFFIDAVIT, AND GIVE THE PARTY A REASONABLE OPPORTUNITY TO AVOID THE DRASTIC ORDER, IF THE PARTY INTRUTH HAS THE EVIDENCE AVAILABLE.

The District Judge struck Mr. Setola's Affidavit of January 7, 1992, App. 58, on the ground it had too many self-serving statements, and/or conclusions, or argumentative statements. In fact, we claim that Mr. Setola merely swore to that which he observed and did. Whether his statements were favorable to him, or not, they were not "self-serving." As to whether a statement is self-serving, we cite, as given on Page 4 of our Reply Brief in the Court of Appeals:

"In 38A Words and Phrases, a "Self-Serving Declaration" is defined by the head notes in some of the cases as follows:

> 'Self-serving declaration' is one made by party in his own interest at some time and place out of court and does not include testimony which he gives as witness at trial. State v. Sharbono, 563 P.2d 61, 67, 175 Mont. 373.
>
> A 'self-serving declaration' is one made by a party inhis own interest at some time and place out of court, not including testimony which he gives as witness at the trial. Cone v. State, Miss., 271 So.2d 453, 455.'
>
> A'self-serving declaration; within rule of exclusion is one made by a party in his own interest at some place and time out of court, and does not include testimony which he gives as a witness at trial. Gibson v. Smith, Mo., 422 S.W.2d 321, 329.'

It seems that the objections to such 'self-serving declarations' occur when a party tries to say that after a key event, the party said such and such, and that such oral statement is admissible. All of Plaintiffs' Affidavits are offered to prove what the Affiant can and will testify to, at a Court trial. The question before this Court and the District Court is, and was, what evidence can Plaintiffs introduce at a trial, to show that Plaintiffs can overcome a Motion for a Directed Verdict? With that standard before this Court, we submit the District Court erred in striking completely the Affidavit of

Mr. Setola; and the same rule applies to Certified Mechanic Karoly's Affidavit, which will be discussed later."

Also, as was stated at page 6 of our Reply Brief:

"The District Court should have, at the least, disregarded the inadmissible, as the Court would have done at trial, and considered all the facts on which Plaintiffs at a trial did offer, and could have offered, evidence.

The District Court exceeded its lawful powers in striking Mr. Setola's Affidavit of January 7, 1992, Entry 60. A strongly supporting case showing the District Court glaringly, grossly, and clearly erred is Southern Concrete Co., v. United States Steel, 394 F. Supp. 362, (USDC, N.D. Georgia, Atlanta Division, 1975, where the Court stated in 394 F.Supp. at Page 380:

(20,21) An Affidavit submitted in connection with a summary judgment motion is subject to a motion to strike if it does not measure up to the standards of Rule 56(e). 6 Moore's Federal Practice ¶56.22 (1974). While the court may strike or disregard the inadmissible portions of such affidavit not in conformity with the rule and consider the rest of the affidavit, the entire affidavit may be disregarded if inadmissible matter is so interwoven or inextricably combined with the admissible portions that it is impossible, in the

practical sense, to separate them. Id. And see cases cited at id. nn. 49-51.'

Perhaps a simpler, and better test here is 'Dickheiser v. Pennsylvania R. Co., 5 F.R.D.5, D.C.E. Pa., 1945 where an appeal the Opinion and holding by Judge Bard, was adopted as the same by the Court of Appeals, (CCA3d., 155 F. 2d 266, Cert. Denied (1947) 32 9 U.S. 808, and in 5 F.R.D. Judge Bard ruled:

(4,5) Rule 56(e) U.S.C.A. following section 723c, provides, inter alia, as follows: 'Suporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.' The rule requires that affidavits in support of a motion for summary judgment must contain evidence which would be admissible as testimony at trial. Seward v. Nissen, D.C., 2 F.R.D. 545. There is no requirement, however, that every statement in the affidavit must meed this test. Where the affidavit includes both competent and incompetent evidence, the Court should disregard the incompetent evidence but give full consideration to that which is competent. See Banco DeEspana v. Federal REserve Bank of New York, 2 Cir., 114 F.2d 438. This is nothing more than the procedure which would be followed at trial. The Court would not strike the entire testimony of a witness merely because a portion of his testimony is incompetent. The same rule is to be applied to supporting affidavits.

Accordingly, the motion to expunge or strike the supporting affidavits is denied.'

To like effect, see 6 Part 2 Morris Federal Practice, 56-762 Page 56-762."

CONCLUSION

The Record in this case does support the facts contained in the Questions Presented For Review. Respondents in the Courts below claimed mere delay is sufficient to justify denial of Withdrawal of Admissions. We say a principle is too harsh. Such delay in failing to Answer Interrogatories does not call for Dismissal.

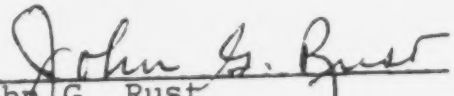
Decisions from this High and Honorable Court are truly needed for the highest levels of the Law to be attained. Conflicts and imperfect rulings do abound.

This counsel has never had the honor of appearing before this Court. As a graduate in his Senior year in the upper 15% of his class at the law school of the University of Virginia, this counsel has the ability and committment to do a job of which one can be

proud.

In behalf of Petitioners, this counsel respectfully moves that our Writ For Certiorari be granted.

Respectfully submitted,



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